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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

BOEING COMPANY

Petitioner,

v.

KENNETH W. ALDRICH

Respondent,

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

***Beth Regier Foerster**
James E. Benfer, III
David O. Alegria
McCULLOUGH, WAREHEIM & LABUNKER, P.A.
1507 S.W. Topeka Boulevard
P.O. Box 1453
Topeka, Kansas 66612
(913) 233-2323
Attorneys for Respondent

**Counsel of Record*

D3AP

QUESTIONS PRESENTED FOR REVIEW

1. When an injured worker has applied for and is receiving monthly employer-provided disability benefits eventually totaling $20,000 and available only to permanently and totally disabled workers unable to engage in any gainful employment, and when he has also applied for and is receiving weekly workers compensation payments, eventually totaling nearly $27,000 and awarded for "temporary total disability", he is judicially estopped from contending in a lawsuit, brought against his employer pursuant to the Americans with Disabilities Act, that he could have performed the essential functions of his job with reasonable accommodation, and was therefore a "qualified individual with a disability", with the meaning of the Americans with Disabilities Act?

2. When an injured worker has settled his future workers compensation claim for "permanent partial general disability" in exchange for a lump sum $30,000 payment from his employer, and when he has obtained that settlement only as a result of his explicit, sworn testimony that he could not perform the essential functions of his job with or without accommodation, is he judicially estopped from contending in a lawsuit, brought against his employer pursuant to the Americans with Disabilities Act, that notwithstanding his sworn testimony to the contrary he could indeed have performed the essential functions of his job with reasonable accommodation, and is therefore a "qualified individual with a disability" within the meaning of the Americans with Disabilities Act?

PARTIES AND PARENT OR SUBSIDIARY COMPANIES

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Kenneth W. Aldrich, respectfully responds to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The court of appeals opinion is reported as *Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998). The court of appeals order denying rehearing (Pet. App. 19) and the district court opinion (Pet. App. 20 to App. 38) are unreported.

JURISDICTION

Respondent agrees this court has timely jurisdiction on the Petition for Writ of Certiorari.

STATUTES INVOLVED

Section 101(8) of the Americans with Disabilities Act, 42 U.S.C. § 12111(8), provides:

> **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . ."

Section 102(a) of the Americans with Disabilities Act, 42 U.S.C. § 12111(a), provides:

> **General Rule.** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Respondent, Kenneth Aldrich, worked under a Collective Bargaining Agreement (CBA) from September 29, 1988 until layoff on June 8, 1993. During that time, he held different positions including a Assembler, Installer Structures B (305-04), and Assembler, Sub-Assembly (B200-04) and was assigned to work assisting the Millwrights within the Facilities Department. (10th Cir. Aplt. App. at 99). Mr. Aldrich reported pain in his right hand, numbness, and decreased grip when using small hand tools on August 4, 1992 to Boeing's Central Medical Department and was referred to an orthopedic surgeon. (Memorandum Order, November 21, 1996, p. 2). Mr. Aldrich was diagnosed with cumulative trauma syndrome manifesting as flexor tenosynovitis and was placed on an involuntary medical leave of absence by Boeing. (Memorandum Order, November 21, 1996, p. 3).

Despite his seniority under the CBA, Mr. Aldrich was not considered for transfer to open and available positions for which he was qualified. (10th Cir. Aplt. App. at 143, 658, "Letter of Understanding No. 20" to the 1992 CBA). Pursuant to the CBA in effect between Boeing and the International Association of Machinists, Mr. Aldrich, as an employee who had previously suffered a work related injury,

possessed contract rights superior to those of an employee possessing Category A rights to an otherwise available position, provided the injured employee had more company seniority than the employee with the Category A rights. (10th Cir. Aplt. App. at 145, 608-623). Mr. Aldrich claimed throughout his employment and appeal that he had seniority rights to positions that would have survived layoffs. Boeing failed to consider him for other positions.

Petitioner Boeing's internal documents clearly show positions were filled during the applicable time frame either by outside hire, recall, or internal transfer, thus documenting the open and availability of positions for which Respondent Aldrich was qualified but was not considered. As a result, the Tenth Circuit Court of Appeals has remanded the case for determination of the seniority basis for positions that Aldrich should have been considered for but was not. (10th Cir. Decision).

Aldrich also claimed in addition to not being considered for open and available positions for which he had seniority rights, that Boeing never provided him with any reasonable ergonomic accommodations to enable him to perform his 305-04 job after injury. (Aplt. App. at 111-115). The Union took the position that there was no conflict which existed between the reasonable accommodation provisions of the ADA and the CBA of 1992. (Aplt. App. at 144).

Because of Mr. Aldrich's receipt of a workers' compensation settlement which included payment under Kansas Workers Compensation laws for his claimed inability to return to his former position at Boeing, the District Court ruled that Mr. Aldrich was not a qualified individual with a disability and therefore sustained Boeing's Motion for Summary Judgment. (Memorandum Order, November 21,

1996). Thereafter, Mr. Aldrich appealed to the Tenth Circuit Court of Appeals. The Tenth Circuit Court reversed the District Court and found that Mr. Aldrich was qualified to perform the essential functions of jobs he had identified. (10th Cir. Decision, July 1, 1998, 146 F. 3d 1265).

Respondent disagrees with Petitioner's statement of the case in regard to Aldrich's workers' compensation rights and representations made by Respondent Aldrich. Respondent Aldrich testified at the settlement hearing for his workers' compensation case that he understood that Boeing was of the opinion that he could not perform the 305-04 job he had previously held, Aldrich had been on an involuntary leave of absence since 1992 and in 1995, he agreed to settle his claim. When questioned about his understanding of the settlement and why it was being made, Respondent Aldrich answered that he understood the basis of the settlement.

It was not Respondent Aldrich's intention to agree that he could not perform the essential functions of the 305-04 job he had previously held. To the contrary, Mr. Aldrich believes that had he been provided reasonable and proper accommodations as detailed by his certified ergonomics expert in this case, Mr. Ross Ailsleger, there did exist jobs within the 305-04 code which he could have performed and for which he was not considered for by Boeing. (10th Cir. Aplt. App. at 100).

Respondent Aldrich's application for disability insurance benefits was made at the suggestion of the Boeing Personnel Department. Mr. Aldrich did not understand at the time he made the application that by doing so, he would be doing something which Boeing might later claim would make him legally unable to pursue legitimate claims for disability discrimination or retaliation. The application said

nothing about Mr. Aldrich having to be "permanently and totally disabled" in order to collect benefits, nor did he have a copy of the Disability Plan Booklet. (10th Cir. Aplt. App. at 100). The benefits in question were not approved by the insurance company until March, 1994 (Memorandum Order, November 21, 1996 p. 9), over one year after Aldrich submitted his application at Boeing's suggestion.

Boeing alleged, and District Court held that Aldrich's medical condition was temporary , hence no ADA protection, because no permanent disability rating had been assigned Mr. Aldrich by a physician. Reversing the District Court, the Tenth Circuit held:

> "May an impairment be substantially limiting for the purposes of the Americans with Disabilities Act (citation omitted) before the date a permanent disability rating has been issued by the treating physician? Answering this question in the affirmative, we reverse the judgment of the District Court and remand for further proceedings." (10th Cir. Decision).

Boeing alleged and the District Court held that Aldrich was barred from an Americans with Disabilities Act claim applying the doctrine of judicial estoppel based on his filing for and receiving benefits under Boeing's private disability plan and the Kansas Workers Compensation Act. In reversing the District Court, the Tenth Circuit held that the benefits he had claimed were awarded without regard to reasonable accommodation. The Tenth Circuit did not apply the doctrine of judicial estoppel, and found that Aldrich's testimony "may constitute evidence relevant to a determination of whether the plaintiff is a 'qualified individual with a disability'" but is not dispositive.

REASONS FOR DENYING THE PETITION

I. SUMMARY OF ARGUMENT

The granting of Certiorari in this case to review the Tenth Circuit's decision on reversing a Motion for Summary Judgment will not assist the Supreme Court in determining the issues raised by the grant of Certiorari in *Cleveland v. Policy Management Systems Corp.*, 120 F. 3d 513 (5th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998).

Additionally, the difference between the circuits in the use of the doctrine of judicial estoppel is not a conflict. All circuits allow evidence of an injured worker's other disability claims. The courts look at disability insurance application forms and receipt of other disability based benefits to evaluate the issue of whether an individual is a "qualified individual with a disability" under the Americans with Disabilities Act.

Finally as the Aldrich case is affirmable on other grounds, therefore the granting of Certiorari or stay of the review of this case will not be affected by the Supreme Court's decision in *Cleveland.*

A. Respondent Aldrich Is Entitled to Receive Employer Provided Disability Benefits and Workers Compensation Benefits and Prove He Is a Qualified Individual with a Disability as Defined by the Americans with Disabilities Act Without Being Barred by the Doctrine of Judicial Estoppel under the Facts of His Case.

In its opinion, the Tenth Circuit Court of Appeals specifically reviewed the benefits Mr. Aldrich recovered from

his private disability plan and the Kansas Workers Compensation Statute. The Tenth Circuit found as follows:

> "It follows that Aldrich is not estopped from pursuing his ADA claim merely because he applied for and received benefits under Boeing's private disability plan and the Kansas workers compensation statute -- those benefits are also awarded without regard to reasonable accommodation." (Emphasis added). (10th Cir. Decision).

The factual basis for the Tenth Circuit's decision included the fact that Respondent Aldrich's application for disability insurance benefits was made at the suggestion of the Boeing Personnel Department. Mr. Aldrich did not understand at the time he made the application that by doing so, he would be doing something which Boeing might later claim would make him legally unable to pursue legitimate claims for disability discrimination or retaliation. The application said nothing about Mr. Aldrich having to be "permanently and totally disabled" in order to collect benefits, nor did he have a copy of the Disability Plan Booklet. (10th Cir. Aplt. App. at 100). The benefits in question were not approved by the insurance company until March, 1994 (Memorandum Order, November 21, 1996 p. 9), over one year after Aldrich submitted his application at Boeing's suggestion.

Respondent Aldrich testified at the settlement hearing for his workers' compensation case that he understood that Boeing was of the opinion that he could not perform the 305-04 job he had previously held, and Aldrich had been on an involuntary leave of absence since 1992, he agreed to settle his claim. When questioned about his understanding

of the settlement and why it was being made, Respondent Aldrich answered that he understood the basis of the settlement.

Petitioner correctly argues that Kansas Workers Compensation Law encourages employers to accommodate injured workers by returning them to work. Respondent agrees with this statement of a policy of the workers compensation act, however, Petitioner has not complied with the policy by placing Aldrich on an involuntary leave of absence. Their argument that they could have potentially negotiated a lesser payment of workers compensation benefits if Aldrich had testified differently in his settlement hearing is moot because at the time of the settlement hearing Aldrich testified: "I was released in '92 to go back to work and Boeing didn't allow me to go back to work." (Settlement Hearing, p. 13, Aplt. App.). All parties were fully informed that Aldrich had a pending ADA claim and Boeing knew they could lessen their liability for private disability benefits, ADA liability, and workers compensation liability by providing reasonable accommodation to Aldrich.

It is important to recognize that this case is being considered at the point in time a Motion for Summary Judgment was filed by Petitioner, ruled upon by the District Court, and remanded by the Tenth Circuit Court of Appeals. The standard for a summary judgment motion, that there be "no genuine issue as to any material fact", Fed. R. Civ. P. 56(c), is not met when the Petitioner and Respondent are in dispute over whether the worker is otherwise qualified for the job, a central question of fact in the proceedings. In addition, factual inferences have to be resolved in favor of the nonmoving party, in this case, Aldrich.

Petitioner is asking the Supreme Court to review the summary judgment ruling that on the facts presented judicial estoppel should have been applied to preclude the case from going to trial on plaintiff's/(Respondent's) claims. On review of summary judgment, it is not the function of Supreme Court to speculate as to ultimate findings of fact. *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 89 S. Ct. 1252, 394 U.S. 495, 22 L. Ed. 2d 495, appeal after remand 452, F. 2d 1095, Certiorari denied 982 S. Ct. 1773, 406 U.S. 919 32 L. Ed. 2d 119 (1969).

The Tenth Circuit correctly held that the benefits Aldrich had claimed were awarded without regard to reasonable accommodation. The Tenth Circuit did not apply the doctrine of judicial estoppel, and found that Aldrich's testimony "may constitute evidence relevant to a determination of whether the plaintiff is a 'qualified individual with a disability'" but is not dispositive. The appropriate decision was reached in Aldrich, and Certiorari should not be granted on the questions raised.

B. There Is Not a Conflict among the Appellate Courts in Whether or Not Judicial Estoppel Is an Appropriate Rule of Law under Certain Facts.

The majority of circuits agree that the application of the doctrine of judicial estoppel is to be done on a case by case basis. The Tenth Circuit has declined to utilize the doctrine of judicial estoppel as an absolute bar to a plaintiff's ADA claim where there has been an application for Social Security Disability or other employer benefits. When the doctrine is utilized, it always requires the court to undergo a fact intensive analysis. When the doctrine is applied in the ADA setting, the courts carefully review the facts to reconcile the intent of Congress in enacting the ADA with

legal principles and rights of all parties in the judicial estoppel doctrine.

As in the Tenth Circuit ruling, inconsistent statements are handled under the Federal Rules of Evidence as they "may constitute evidence relevant to a determination of whether the plaintiff is a 'qualified individual with a disability'". Therefore, the integrity of the judicial system is protected by admissibility of inconsistent statements or evidence of impeachment as well as admissibility of the definitions of the policy benefit entitlements and circumstances of the application.

As recently noted in the case of *Talavara v. School Board of Palm Beach County*, 11th Cir. 129 F. 3d 1214 (1997):

> "Consistent with the majority of courts to have addressed the issue, the court adopted a fact-specific approach to the issue of whether an employee's certification of total disability on a Social Security Disability benefits application precludes an employee from proving the qualification element of an ADA claim . . . The employee presented evidence sufficient to raise an issue as to whether she could have performed the essential functions of her position with reasonable accommodation."

The issue for determination in this particular case is whether or not Respondent Aldrich has made a *prima facie* case showing of material facts which would meet his burden of proof to show the essential elements of his claim under the ADA, including:

> **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . ." Section 101(8) of the Americans with Disabilities Act, 42 U.S.C. § 12111(8).
>
> **General Rule.** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. Section 102(a) of the Americans with Disabilities Act, 42 U.S.C. § 12111(a).

According to the Tenth Circuit, the facts submitted by Respondent Aldrich to Petitioner Boeing's Motion for Summary Judgment were sufficient as a matter of law, both to the permanent nature of his condition and reasonable accommodations that were not provided.

Respondent Aldrich believes Boeing has misstated the Tenth Circuit's ruling in *Rascon v. US West Communications, Inc., & Equal Employment Opportunity Commission*, 143 F. 3d, 1324 (10th Cir. 1998). *Rascon* joins the majority of Circuits and holds statements made in connection with an application for Social Security Disability benefits cannot be an automatic bar to a disability discrimination claim under the ADA. The Court held that such statements may, however, constitute evidence relevant

to a determination of whether the Respondent is a "qualified individual with a disability". *Rascon* held that there is nothing inconsistent in Mr. Rascon applying for disability benefits after having his reasonable accommodation denied.

As Boeing's facts were presented to the District Court and the Tenth Circuit on the issue of Mr. Aldrich's receipt of other benefits and the facts were considered in the Tenth Circuit decision, the evidence before this court has already been found to create an issue of material fact sufficient to allow Mr. Aldrich's claims to go forward to trial. Boeing's position on judicial estoppel would not allow a full presentation of the facts.

C. The Aldrich Case Is Dissimilar to *Cleveland v. Policy Management Systems Corporation*, a Case in Which this Court Has Granted Certiorari and Granting Certiorari in Aldrich Will Not Assist the Court in Deciding the Writ in *Cleveland.*

Granting the Petition for Certiorari in this case will not assist the court in determining the issues assessed by the Certiorari that has been granted in *Cleveland v. Policy Management Systems Corp.*, 120 F. 3d 513 (5th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998). There are highly significant factual differences between the *Cleveland* case and the case at bar. Specifically, in the *Cleveland* case, the court granted limited Certiorari for two questions:

> "1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423 [42 USCS § 423], creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is

> a 'qualified individual with a disability' under the Americans With Disabilities Act of 1990 (ADA)", 42 U.S.C. § 12101 *et seq.* [42 USCS §§ 12101 *et seq.*].
>
> "2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a 'qualified individual with a disability' under the ADA?"

The "mere application or receipt" issue regarding Social Security Disability benefits is not present in this case. Respondent Aldrich did not claim, make an application for, or draw Social Security Disability benefits. Therefore, this case is readily distinguishable from *Cleveland.* The precise impact, if any, of prior Social Security Administration (SSA) representation on a plaintiff's ADA claim is an open question in the Tenth Circuit. *Smith v. Midland Brake, Inc.*, 138 F. 3d 1304 (1998).

Therefore, the issues in Aldrich are not the same factual or legal issues before the Court in *Cleveland.* Accordingly, resolving these factually and legally dissimilar cases would not assist the Court in helping to decide the question that has been granted for review in *Cleveland.*

D. The Aldrich Decision Is Subject to Affirmance on Alternate Grounds Established by the Judgment of the Tenth Circuit Court of Appeals and Therefore Grant of Certiorari Would Not Change the Result in Aldrich.

The Tenth Circuit Court of Appeals' decision in Aldrich subject to affirmance on alternate grounds. The Tenth Circuit Decision reviewed the case on the basis of:

> "May an impairment be substantially limiting for the purposes of the Americans with Disabilities Act (citation omitted) before the date a permanent disability rating has been issued by the treating physician? Answering this question in the affirmative, we reverse the judgment of the District Court and remand for further proceedings." (10th Cir. Decision).

The Tenth Circuit finding that the fact that a permanent impairment rating had not been issued still entitles the plaintiff to determination of his status as a disabled individual under the ADA, is an alternate ground for affirmance.

An additional ground for affirmance of the Tenth Circuit decision includes the failure of Boeing to consider Aldrich for open and available positions. The ADA prohibits employers from discriminating against qualified individuals with disabilities because of the disabilities in terms, conditions, or privileges of employment. (42 U.S.C. § 12112(a)). A plaintiff must prove within the meaning of the ADA:

> 1. That he is a disabled person within the meaning of the ADA;
>
> 2. That he is qualified, with or without reasonable accommodation, he is able to perform the functions of the job that he

> was performing or the position that is desired; and
>
> 3. That the employer fired the individual because of the disability. *White v. York Int'l Corp.*, 46 F. 3d, 357, 360-61 (10th Cir. 1995). (Emphasis added).

Specifically, the Equal Employment Opportunity Commission (EEOC) has defined a reasonable accommodation to include reassignment to a vacant position. (42 U.S.C. § 12111(9)(B)); 29 C.F.R. § 1630.2(o)(2)(ii)(1997)). The guidelines state that,

> "in general, reassignment should be considered only when an accommodation within the individual's current position would pose an undue hardship [to the employer]." (29 C.F.R. Pt. 1630, App. § 1630.2(o)).

Undue hardship is defined as "significant difficulty or expense in, or resulting from, the provision of the accommodation". (*Id.* at Pt. 1630, App. § 1630.2(p)).

The legal application of reassignment to a vacant position is not a new concept under preexisting disability law. The Americans with Disabilities Act and the Federal Rehabilitation Act are generally to be interpreted and applied consistently with each other. (29 U.S.C. §§ 791(g), 794(d); 42 U.S.C. §§ 12117(b), 12201(a); White, *supra.* 45 F. 3d at 360 n. 5).

The U.S. Supreme Court in dicta held in *School Board v. Arline*, 480 U.S. 273 (1987), a Federal Rehabilitation Act case:

> "Although [employers] are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." (*Id.* at 289 n. 19 (citations omitted)).

In *White, supra*, the employee was unable to perform his current job but did not establish a job that he could to. The Court did not reject reassignment for that reason. Instead, the Court rejected reassignment because the employer established in *White* that there were no vacant equivalent positions that the employee could have performed. *White, supra.* (45 F. 3d 357, 361-62 (10th Cir., 1995)).

The Tenth Circuit's decision in Aldrich is affirmable on the grounds that plaintiff identified the reasonable accommodation of transfer by seniority to open and available positions that have been identified as reasonable accommodations under the CBA. The Tenth Circuit specifically found:

> "Viewing the factual record in the light most favorable to the plaintiff, we see a genuine issue of material fact concerning whether work modifications and/or ergonomic training were reasonable accommodations that would have permitted plaintiff to return to his original job as an assembly worker. We also find evidentiary support for plaintiff's argument that there exists two other positions to which he could have been reassigned as a

reasonable accommodation." (10th Cir. Decision).

The certified professional ergonomics expert also opined that Boeing could have accommodated Aldrich by transferring him to one of several positions within his skill and grade level. (10th Cir. Decision). The Tenth Circuit correctly concluded that Respondent may have been eligible for a Factor Service Attendant A or a Factory Clerk C position as early as December, 1992, positions which were not offered to Respondent and he was terminated on June 8, 1993. (10th Cir. Decision). Respondent's identified accommodation would have allowed Aldrich to remain employed and survive layoffs as a result of his seniority. (10th Cir. Decision). Petitioner, Boeing, did not provide these reasonable accommodations to Respondent, Aldrich, which resulted in his termination.

The affirmance on alternate grounds identified herein, would neither expand nor contract the rights of either party and is therefore appropriate. *Granfinanciera F. A. v. Nordberg*, 109 S. Ct. 2782, 492 U.S. 33, 106 L. Ed. 2d 26 (1989). Any ground properly raised below may be urged as basis for Supreme Court's affirmance of Court of Appeals' decision. *Whitley v. Albers*, 106 S. Ct. 1078, 475 U.S. 312, 89 L. Ed. 2d 251, on remand 788 F. 2d 650 (1986).

The Tenth Circuit correctly found that Aldrich was entitled to consideration for open positions, positions that he would have been eligible for as a result of his seniority rights. This alternate ground has considerable impact to Respondent Aldrich's rights under the ADA, and is affirmable on these grounds.

CONCLUSION

The Tenth Circuit decision at issue is consistent with the majority of circuits that admit evidence of an employee's statements and circumstances in applying for employer benefits. Based on appropriate evidence, employees may be entitled to permanent total disability, workers' compensation, and enforce their rights for reasonable accommodation under the Americans with Disabilities Act. In Aldrich, the employer's placement of the worker on an involuntary leave of absence was found to be inconsistent with their obligation to consider Aldrich for other open and available positions or for ergonomic modification of his position.

The granting of the Petition for Certiorari is unnecessary to resolve a conflict in the circuits as all circuits allow evidence of statements made on applications for employer benefits and for Social Security Disability. In addition, the particular facts of Aldrich are so dissimilar to *Cleveland* that granting Certiorari will not assist the court in its review.

RESPECTFULLY SUBMITTED:

*Beth Regier Foerster
James E. Benfer, III
David O. Alegria
MCCULLOUGH, WAREHEIM & LABUNKER, P.A.
1507 Topeka Boulevard
P.O. Box 1453
Topeka, Kansas 66601-1453
(913) 233-2323
ATTORNEYS FOR RESPONDENT

**Counsel of Record*